No. 397

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, APPELLANT

v.

THE BORDEN COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

INDEX

TABLE OF CASES

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OPINION BELOW

The opinion of the District Court (R. 98–113) is not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, U. S. C., Title 18, Section 682, as amended, otherwise known as the Criminal Appeals Act, and under Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936,

U. S. C., Title 28, Section 345. The order and judgment of the Court below was entered on July 28, 1939 (R. 114–118). The order allowing appeal was entered on August 17, 1939 (R. 94–95). On October 16, 1939, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

STATUTES INVOLVED

The statute primarily involved is Section 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the act of August 17, 1937, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, which, so far as pertinent here, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In construing the Sherman Act the Court below also considered the following statutory provisions:

The Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, as amended August 24, 1935,

c. 641, 49 Stat. 750, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, c. 296, 50 Stat. 246, 7 U. S. C., Supp. IV, Section 601, *et seq.* (hereinafter referred to as the "Marketing Agreement Act"). An annotated compilation of the Act is attached to this brief as Appendix A.

Section 6 of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17.

The Capper-Volstead Act of February 18, 1922, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292.

The pertinent provisions of the last two mentioned acts and of the Criminal Appeals Act are set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of this appeal under the Criminal Appeals Act.

2. Whether the Agricultural Marketing Agreement Act removes the production and marketing of agricultural products, including milk, from the purview of Section 1 of the Sherman Act.

3. Whether Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act, exempt a cooperative association, engaged in the production and marketing of agricultural products, from prosecution under Section 1 of the Sherman Act.

STATEMENT

A. The Indictment

On November 1, 1938, the appellees were indicted in the United States District Court for the Northern District of Illinois, Eastern Division, on four counts, each charging an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act (R. 1–30). The trade and commerce involved is the transportation to the Chicago market of fluid milk produced for that market on dairy farms located in Illinois, Indiana, Michigan, and Wisconsin, and the distribution of the milk in that market (R. 3, par. 24).

The indictment describes in general terms the production of milk for the Chicago market; its transportation to, and distribution in, that market; and the extent to which those operations are regulated by ordinances of the City of Chicago (R. 2–4). Under these regulations fluid milk distributed in the City of Chicago must be produced on a dairy farm approved by the Board of Health. The indictment alleges, among other things, that in the States of Illinois, Indiana, Michigan, and Wisconsin there are more than 15,000 dairy farms approved by the Board of Health of the city for the shipment of fluid milk to the Chicago market; of these farms more than 50%, producing approximately 40% of all fluid milk coming

from approved dairy farms, were located in States other than Illinois (R. 2–3, pars. 16–23).

The defendants named in the indictment fall into five groups:

(1) *Distributors and allied groups.*[1]—This group of defendants includes—

(a) Ten corporations, hereinafter referred to as major distributors, which sell approximately 65% of the fluid milk sold in the city of Chicago; each of these corporations purchases a substantial quantity of fluid milk outside of Illinois and transports it to Chicago (R. 4, pars. 25–28);

(b) Certain officers and agents of the major distributors (R. 5–6, par. 29);

(c) The Associated Milk Dealers, Inc., a trade association of milk distributors, and certain of its officers and agents (R. 6–7, pars. 30–33);

(d) The Milk Dealers Bottle Exchange, a corporation controlled by the major distributors, which collected and distributed milk

[1] These defendants are: The Borden Co., Borden-Wieland, Inc., Bowman Dairy Co., Sidney Wanzer & Sons, Inc., Hunding Dairy Co., Capitol Dairy Co., Western-United Dairy Co., Western Dairy Co., Inc., United Dairy Co., International Dairy Co., D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, Gordon B. Wanzer, H. Stanley Wanzer, Carl W. Hunding, Hyman I. Freed, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Louis Janata, Paul Potter, Otto Black, and Sidney Wanzer III.

bottles and other containers used by distributors (R. 8–9, pars. 37–38).

(2) *The Pure Milk Association, and certain of its officers and agents.*[2]—This is an association of milk producers incorporated under "The Cooperative Marketing Act of Illinois," which has a membership of over 12,000 producers, approximately 50% of whom are located outside the State of Illinois (R. 7, par. 34). More than 80% of the milk produced by members of this association was produced on municipally approved dairy farms, and approximately 75% of the milk so produced was purchased by the major distributors (R. 8, par. 35). This association acted as marketing agent for its members (R. 8, par. 35).

(3) *Milk Wagon Drivers Union, Local 753, and certain labor officials.*[3]—This union has more than 5,000 members engaged in the distribution of milk in the City of Chicago; more than 75% of its members were employed by the major distributors (R. 9–10, pars. 39, 40, 41, 42).

(4) *Municipal Officials.*[4]—This group includes the President of the Board of Health of the City

[2] The officers and agents of the Pure Milk Association indicted are: Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case.

[3] The labor officials indicted are: Robert G. Fitchie, James Kennedy, Steve Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, and Leslie G. Goudie.

[4] This group of defendants consists of: Herman N. Bundesen, Paul Krueger, William J. Guerin, and Daniel A. Gilbert.

of Chicago, two subordinate officials of the Board whose duties relate to the approval and inspection of dairy farms, and a police officer (R. 10, par. 43).

(5) *The Arbitrators.*[5]—Two persons who arbitrated a dispute between the major distributors and Pure Milk Association and, in the course of that arbitration, fixed the price for fluid milk to be paid by the major distributors to the members of the Pure Milk Association (R. 10, par. 44).

The period of time involved in each of the four counts of the indictment begins in the month of January 1935 and continues thereafter up to and including the date of the return of the indictment, November 1, 1938 (R. 1, par. 1).

The first count charges that all the defendants—

> * * * unlawfully have combined and conspired together and engaged with one another to arbitrarily fix, maintain, and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms located in the States of Illinois, Indiana, Michigan, and Wisconsin, and including all fluid milk so produced and shipped from the States of Illinois, Indiana, Michigan, and Wisconsin into the said city of Chicago [R. 11, par. 47].

[5] The arbitrators were Leland Spencer and W. A. Wentworth.

The means and methods by which the combination and conspiracy in Count One was intended to be effected and was effected are detailed in paragraphs 48–61 (R. 11–16).

The second count charges that all the defendants—

> * * * unlawfully have combined and conspired together and engaged with one another to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the City of Chicago of fluid milk shipped into the said City from the States of Illinois, Indiana, Michigan, and Wisconsin [R. 17, par. 63].

The means and methods by which the combination and conspiracy charged in Count Two was intended to be effected and was effected are detailed in paragraphs 64–74 (R. 17–20).

The third count charges that all the defendants—

> * * * unlawfully have combined and conspired together and engaged with one another to hinder and to prevent prospective independent distributors from engaging in the business of distributing fluid milk in the City of Chicago, to hinder and to prevent existing independent distributors from distributing fluid milk in the City of Chicago in competition with the major distributors, to hinder and to prevent the distribution of fluid milk to stores and by stores in the City of Chicago, and to hinder and to prevent any

> distribution of fluid milk in the City of Chicago, except by the method and in the manner determined by said defendants [R. 21, par. 76].

The means and methods by which the combination and conspiracy in Count Three was intended to be effected and was effected are detailed in paragraphs 77–86 (R. 21–24).

The fourth count charges that all the defendants—

> * * * unlawfully have combined and conspired together and engaged with one another and with divers other persons to restrict, limit, and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the City of Chicago from the States of Illinois, Indiana, Michigan, and Wisconsin [R. 25, par. 88].

The means and methods by which the combination and conspiracy charged in Count Four was intended to be effected and was effected are detailed in paragraphs 89–98 (R. 25–29).

B. Defendants' Demurrers and Motions to Quash

Demurrers and motions to quash, presenting various objections to the indictment, were interposed by each of the defendants (R. 31–93). On July 28, 1939, these demurrers and motions to quash were sustained by the District Court as to all counts of the indictment and the indictment was dismissed

as to all defendants (R. 114). By its order and judgment, the court held that certain of the demurrers and motions to quash must be sustained as to the first, second, and fourth counts of the indictment on the ground that no indictment will lie under Section 1 of the Sherman Act with respect to the production and marketing of agricultural products, including milk, because the production and marketing of such products are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act (R. 115)..

The court also held as to Counts One, Two, Three, and Four that, in so far as the Pure Milk Association, its officers and agents, are concerned, no indictment will lie under Section 1 of the Sherman Act with respect to the production and marketing of agricultural products, including milk, because when Section 1 of the Sherman Act is construed in the light of Section 6 of the Clayton Act, the Capper-Volstead Act, and The Agricultural Marketing Agreement Act, it appears that the Pure Milk Association, as an agricultural cooperative association, is exempt from prosecution under Section 1 of the Sherman Act (R. 116).

The court also sustained demurrers to the third count of the indictment on two independent grounds, viz. duplicity in charging at least four separate and distinct conspiracies and failure definitely to allege a restraint of interstate commerce (R. 116–117).

The court below overruled the demurrers and motions to quash interposed by all defendants as to Counts One, Two, and Four, in so far as they challenged these counts on the ground that interstate commerce was not involved and as to all counts, in so far as they challenged the constitutionality of the Sherman Act, the sufficiency of the allegations of unlawful conspiracy, and on all other grounds not specifically overruled or sustained (R. 117).

C. Limitations Upon Issues Involved

The case of *United States* v. *Hastings*, 296 U. S. 188, is authority for two principles governing appeals under the Criminal Appeals Act, which restrict the issues involved in this appeal in the following manner:

1. Count Three is eliminated from consideration on this appeal by application of the principle that this Court will refuse to entertain an appeal under the Criminal Appeals Act from a judgment of the District Court quashing an indictment where the judgment was based not only upon the invalidity or construtcion of the statute upon which the indictment was founded, but also upon another and independent ground. It has already been noted that the District Court sustained demurrers to the third count on the independent grounds of duplicity and failure definitely to allege a restraint of interstate commerce. *United States* v. *Hastings*, 296 U. S. 188, 193, 194.

2. Conversely, as to Counts One, Two, and Four, this appeal involves no question of the construction of the indictment or of its sufficiency merely as a pleading as distinguished from the construction of the Sherman Act upon which the District Court founded its decision. *United States* v. *Hastings*, 296 U. S. 188, 192.

It is noted above that the District Court overruled all demurrers and motions to quash interposed as to Counts, One, Two, and Four insofar as they challenged the sufficiency of the allegations and on all other grounds except the particular grounds involving the construction of the Sherman Act with respect to the exemption therefrom of agricultural products and agricultural cooperative associations. It is clear, therefore, that the case comes before this Court in the posture of an indictment sufficient to state an offense in all respects in the manner charged, unless the acts charged in those counts are excluded from the purview of the Sherman Act on the grounds found by the District Court.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the various joint and several demurrers, motions to quash and special pleas of the defendants The Borden Company, H. W. Comfort, S. M. Ross, Charles L. Dressel, Harry M. Reser, W. A. Baril, O. O. Smaha, R. W. Nessler, F. A. Webb, W. A. Wentworth, Bowman Dairy

Company, D. B. Peck, Francis H. Kullman, Jr., M. J. Metzger, H. T. Adamson, J. F. Philippi, Hunding Dairy Company, Carl W. Hunding, Capitol Dairy Company, Hyman I. Freed, Sidney Wanzer & Sons, Inc., H. Stanley Wanzer, Gordon B. Wanzer, International Dairy Company, Louis Janata, Western-United Dairy Company, Western Dairy Company, Inc., United Dairy Company, Louis G. Glick, Maurice S. Dick, Samuel S. Dick, Milk Dealers Bottle Exchange, Associated Milk Dealers, Inc., Paul Potter, Otto Black, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy, Steve C. Sumner, Fred C. Dahms, F. Ray Bryant, John O'Connor, David A. Riskind, Leslie G. Goudie, Daniel A. Gilbert, Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, John P. Case, Leland Spencer, Herman N. Bundesen, Paul Krueger, and William Guerin interposed to the first, second, and fourth counts of the indictment in the above entitled cause.

2. In sustaining said demurrers, motions to quash, and special pleas interposed to the first, second, and fourth counts of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, with respect to the production and marketing of agricultural products, including milk, because the

production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Section 601 *et seq.*, as amended August 24, 1935, c. 641, 49 Stat. 750, U. S. C., Title 7, Section 601 *et seq.*, and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, U. S. C., Title 7, Supp. IV, Par. 601 *et seq.*

3. In sustaining the joint and several demurrers and special pleas of the defendants Pure Milk Association, Don N. Geyer, Edward F. Cooke, E. E. Houghtby, F. J. Knox, Lowell D. Oranger, and John P. Case which were interposed as to Counts One, Two, and Four of the indictment in the above entitled cause, on the ground that no indictment will lie under Section 1 of the Sherman Act, c. 690, 50 Stat. 693, U. S. C., Title 15, Section 1, with respect to the production and marketing of agricultural products, including milk, because Section 6 of the Clayton Act, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17; Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292; and the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Section 601, *et seq.*, as amended August 24, 1935, c. 641, 49 Stat. 750, U. S. C., Title 7, Section 601 *et seq.* and as reenacted and amended by the Agricultural Marketing Agreement Act of June 3, 1937, c. 296, 50 Stat. 246, U. S. C., Title 7, Supp. IV, Section 601, *et seq.*, when properly construed, ex-

empt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act.

4. In dismissing Counts One, Two, and Four of the indictment in the above entitled cause as to all of the defendants.

SUMMARY OF ARGUMENT

I

The judgment of the District Court was based upon the construction of Section 1 of the Sherman Act upon which the indictment was founded. The decision is no less a construction of the Sherman Act because the District Court construed that Act in the light of other statutes to determine its application to the acts charged in the indictment. It follows that this Court has jurisdiction of the appeal under the Criminal Appeals Act.

Moreover, such jurisdiction may be sustained on the additional ground that the judgment is one sustaining a special plea in bar and the defendants have not been put in jeopardy.

II

The acts charged in the indictment are illegal under the Sherman Act and are not exempt from its application by reason of the provisions of other statutes. The Sherman Act by its terms applies to commerce in agricultural products, including milk. Immunity from the application of the Sherman Act cannot be implied but must be expressly

granted and none of the statutes enacted since the Sherman Act confers immunity from its application to commerce in agricultural products.

There is a fundamental misconception in the opinion of the court below that the policy of the agricultural legislation represents a trend contrary to the policy of the Sherman Act. There is no foundation for this theory of inconsistency between the statutes. On the contrary, these acts show a positive legislative intention to further the objectives of the Sherman Act and to accomplish its practical enforcement with respect to agricultural products. The Sherman Act permits reasonable combinations and reasonable restraints upon interstate commerce. The agricultural legislation aids the application of the Sherman Act to agricultural products by clarifying the legislative conception of what are reasonable combinations and reasonable restraints on commerce in agricultural commodities. One of the criteria for determining the reasonableness of any restraint is whether it contributes to or impedes the orderly marketing of the product without destroying effective competition. Another criterion is whether the combination is necessary to confer equality of bargaining power upon those marketing their goods or services. The agricultural legislation provides legislative recognition that certain marketing practices when carried out under responsible public supervision, are reasonable aids to collective bargaining and

efficient distribution of agricultural products under responsible public supervision and defines certain reasonable combinations effective to these ends to which, and to which alone, the statutes make it clear that the prohibition of the Sherman Act shall not apply. In making these provisions Congress has protected the principle of the antitrust laws by providing for positive and direct administrative regulation where it permits combinations to be operative for these limited purposes. The error of the court below in assuming an inconsistency between the policy of the Sherman Act and the later agricultural legislation vitiates the premises upon which the opinion below is based.

Moreover, as a matter of statutory construction, none of the acts passed since the Sherman Act exempts commerce in agricultural products generally from the Sherman Act. The court below did not rely upon any legislation prior to the Marketing Agreement Act to establish the exemption upon which it based the decision in this case, but found such an exemption by implication from the scheme of regulation provided for in the Marketing Agreement Act. The terms of the Marketing Agreement Act make it clear that no general exemption was intended.

The Marketing Agreement Act expressly exempts from the antitrust laws only marketing agreements entered into under the Act and meetings held, and awards and agreements made in the

course of arbitration proceedings conducted in accordance with the specific provisions of the Act. The terms of these exemptions and the legislative history of the Act make it clear that Congress did not intend to confer immunity from the Sherman Act generally upon all commerce in agricultural products, but intended instead merely to make it clear that certain of the methods provided in the Act for accomplishing its limited purposes were not subject to the antitrust laws. None of the acts charged in the indictment was committed pursuant to, or under the color of, the provisions of the Marketing Agreement Act.

Furthermore, the stated policy of the Marketing Agreement Act is limited to such regulation of interstate commerce as is necessary to raise prices paid to farmers for their products to a parity specified in the Act. It is clear from its stated policy that the Act does not seek to accomplish general and complete regulation of interstate commerce in agricultural commodities. Finally, the methods of regulation for which the Act provides are not adapted to complete regulation of commerce in agricultural products; their use is expressly limited to the accomplishment of the limited stated purpose of the Act.

Taken as a whole, the terms of the Act, its stated policy, and its legislative history make it clear that Congress did not intend to exempt commerce in agricultural products from the Sherman Act.

III

The Capper-Volstead Act does not exempt the Pure Milk Association, as an agricultural cooperative association, from the provisions of the Sherman Act. The Capper-Volstead Act, by its terms and by its legislative history, shows a purpose merely to provide farmers with an adequate form of business organization enabling them to bargain collectively with large-size business corporations in marketing their products. It does not give them any general immunity from the application of the antitrust statute. Certainly it confers no immunity from prosecution for the kind of acts charged in the indictment in this case. Section 2 of the Act, empowering the Secretary of Agriculture to issue a cease-and-desist order in case such an association unduly enhances the price of any product, is an anti-profiteering provision which circumscribes the privilege of action by farmers conferred by Section 1 of the same Act. Section 2 has as its purpose the direct control of unreasonable prices; this purpose is not coextensive with the purpose of the Sherman Act. Section 2 of the Capper-Volstead Act supplements rather than displaces the antitrust laws.

ARGUMENT

I

THIS COURT HAS JURISDICTION UNDER THE CRIMINAL APPEALS ACT

The judgment of the District Court sustaining the demurrers to the indictment was based upon the construction of Section 1 of the Sherman Act upon

which the indictment was founded (R. 114–118). It follows that this Court has jurisdiction of the appeal under the Criminal Appeals Act. *United States* v. *Patten*, 226 U. S. 525; *United States* v. *Pacific & Arctic Ry. Co.*, 228 U. S. 87; *United States* v. *Schrader's Son, Inc.*, 252 U. S. 83; *United States* v. *Kapp*, 302 U. S. 214.

Some of the appellees in opposing jurisdiction contend that the judgment was not based upon a construction of the Sherman Act "but upon the validity and interpretation of the several acts of Congress passed subsequent to the enactment of the statute upon which the indictment is founded" (*i. e.*, Clayton Act, Capper-Volstead Act, and Agricultural Marketing Agreement Act).[6] Other appellees contend that "in spite of the fact that the acts charged would have brought the defendants under the Sherman Act prior to the enactment of the later laws, they are now no longer indictable under the Sherman Act because the new laws have vested the Secretary of Agriculture with sole jurisdiction and have granted a new and exclusive method of prosecuting and punishing such acts."[7] Still other appellees argue that "the agricultural marketing acts have withdrawn initial judicial power from the Federal District Courts over the general subject matter of the production and

[6] See paragraph 2 of Statement Opposing Jurisdiction on behalf of Pure Milk Association *et al.*

[7] See Statement Opposing Jurisdiction on behalf of Associated Milk Dealers, Inc., et al.

marketing of agricultural commodities, including milk, thereby carving from Section 1 of the Sherman Act any application to such commodities."[*]

These arguments that the court did not construe the Sherman Act but merely declined jurisdiction of the offense charged, appear strained and artificial in the face of the express findings in its order and judgment that (a) "the production and marketing of agricultural products are removed from the purview of the Sherman Act" by the Agricultural Marketing Agreement Act (R. 115) and (b) that Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act "exempt the Pure Milk Association, an agricultural cooperative association, together with its officers and agents, from prosecution under Section 1 of the Sherman Act" (R. 116).

The opinion of this Court in *United States* v. *Patten*, 226 U. S. 525, gives a succinct answer to the appellees' contention that the District Court did not construe the Sherman Act but merely gave effect to the other acts. In that case, the District Court sustained a demurrer to an indictment under the Sherman Act for running a corner in cotton on the ground that the acts charged were not denounced as criminal by the Sherman Act. Jurisdiction of this Court under the Criminal Appeals Act was opposed on the ground that the judgment

[*] See Statement in Opposition on behalf of Sidney Wanzer & Sons, Inc.,

did not involve the construction of the statute. To that contention this Court replied (p. 535):

> The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a soleecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

The decision in the instant case is no less a construction of the Sherman Act because of the fact that the District Court construed the Sherman Act in the light of other statutes to determine its application to the acts charged. Cf. *United States* v. *Kapp*, 302 U. S. 214, holding that, in an indictment under a conspiracy statute to violate another statute, a construction of the statute at which the conspiracy is aimed will be treated under the Criminal Appeals Act as a construction of the statute upon which the indictment is founded.

Appellant suggests that if there be any doubt as to the jurisdiction of this Court on the ground discussed, jurisdiction may be sustained on the additional ground that the judgment of the District Court is one sustaining a special plea in bar when the defendants have not been put in jeopardy. See *United States* v. *Celestine*, 215 U. S. 278; *United States* v. *Barber*, 219 U. S. 72; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407; *United States* v. *Goldman*, 277 U. S. 229.

II

THE ACTS CHARGED IN THE INDICTMENT ARE ILLEGAL UNDER THE SHERMAN ACT AND ARE NOT EXEMPT FROM ITS APPLICATION BY REASON OF THE PROVISIONS OF OTHER STATUTES

A. The Sherman Act by its terms applies to combinations and conspiracies in restraint of interstate commerce in agricultural products, including milk.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

It makes illegal every contract, combination, or conspiracy which, in any manner or to any extent, restrains interstate commerce, provided the restraint is unreasonable.[9] No commodities are particularly named. The language is sweeping and unqualified. It applies to all interstate commerce, regardless of the articles which are the subject of such commerce. It is evident beyond question from the terms of the Act that it applies to interstate commerce in agricultural products, such as milk,[10] and it does not appear that the court below construed it otherwise.

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[9] *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344.

[10] Combinations and conspiracies restraining trade and commerce in agricultural products have been held to be

It is also clear that the acts charged in the indictment fall into the category of acts which are illegal under the Sherman Act. Counts One and Two charge that the defendants combined and conspired to fix prices. Such combinations and conspiracies are illegal under the antitrust laws. *United States* v. *Trenton Potteries*, 273 U. S. 392; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Sugar Institute*, 297 U. S. 553. Count Four of the indictment charges that the defendants combined and conspired to restrict the supply of milk moving in the channels of interstate commerce into the Chicago market. This kind of activity is likewise patently illegal under the Sherman Act. See *American Column Co.* v. *United States*, 257 U. S. 377; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310.

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illegal as in violation of the Sherman Act in *Sugar Institute* v. *United States*, 297 U. S. 553; *Local 167* v. *United States*, 291 U. S. 293; *Nash* v. *United States*, 229 U. S. 373; *United States* v. *Patten*, 226 U. S. 525; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Kissel*, 218 U. S. 601; *Swift and Company* v. *United States*, 196 U. S. 375; *Greater New York Live Poultry Cham. of Comm.* v. *United States*, 47 F. (2d) 156; *Live Poultry Dealers' Protective Ass'n* v. *United States*, 4 F. (2d) 840; *United States* v. *M. Piowaty & Sons*, 251 Fed. 375; *United States* v. *King*, 250 Fed. 908, 229 Fed. 275; *United States* v. *Corn Products Refining Co.*, 234 Fed. 964; *United States* v. *Whiting*, 212 Fed. 466; *United States* v. *Swift*, 188 Fed. 92.

B. Immunity from the application of the Sherman Act cannot be implied by reference to general legislative policy or to asserted inconsistencies in other statutes but must be expressly granted

The view of the court below appears to be that a series of laws enacted since the Sherman Act, although not expressly exempting agricultural products from the operation of that Act, have so undermined its basic political philosophy with respect to commerce in agricultural products that the Act no longer applies to such commerce—in short, that these later statutes have repealed the Sherman Act, so far as agricultural products are concerned, not expressly but by implication.

This result is in conflict with well-established canons of statutory construction. The courts do not favor repeal by implication. *General Motors Corp.* v. *United States,* 286 U. S. 49, 61–62; *Henderson's Tobacco,* 11 Wall. 652, 656–657; *United States* v. *Tynen,* 11 Wall. 88, 92; *Posadas* v. *National City Bank,* 296 U. S. 497, 503–505.

Furthermore, exemptions from statutes cannot be sustained merely by reference to shifts in general legislative policy but must rest upon a clear statutory expression of the intention to grant the exemption. *United States* v. *Barnes,* 222 U. S. 513, 520–521; Cf. *Baltimore Nat. Bank* v. *Tax Comm'n,* 297 U. S. 209, 212–213. Similarly no exemption,

not expressly granted, can be established by reference to asserted inconsistencies in other statutes. *Frost* v. *Wenie,* 157 U. S. 46, 58; *Henderson's Tobacco,* 11 Wall. 652, 656–657.

These principles have particular force with respect to an exemption such as that found by the court below in this case, which would constitute, in effect, a complete abrogation of the Sherman Act with respect to agricultural products. The difficulty of justifying a determination that the language of a statute is so plainly repugnant to the continued effectiveness of an earlier statutory provision that the two cannot remain simultaneously operative is infinitely magnified where, as in this case, the statute held to be supplanted prescribes a sweeping regulation of a huge field of commerce. In such a case the succeeding statute, if it could in any case be held to repeal the earlier one without explicity saying so, must at least provide a scheme of regulation plainly applicable to all of the many situations to which the earlier statute applies and must apply to such situations in a way so clearly inconsistent with the continued effectiveness of the earlier statute as to make it plainly evident that Congress did not intend the earlier statute to remain effective. We submit that is not the case here. As we shall point out, none of the acts subsequent to the Sherman Act expressly exempt the acts charged in this case from the operation of the

Sherman Act and their provisions fall far short of establishing a scheme of regulation which so covers the field regulated by the Sherman Act as to justify a finding that they are repugnant to the continued application of the Sherman Act to commerce in agricultural products. Cf. *Henderson's Tobacco*, 11 Wall. 652, 656–657.

C. The agricultural legislation instead of representing a trend against the application of the Sherman Act to agricultural products shows a positive legislative policy to further both its objectives and its practical enforcement with respect to agricultural products

As we have pointed out above it is not within the power of the courts to weave legislation which it considers to be inconsistent into a consistent economic theory by supplying repeal clauses not found in the acts themselves. It is evident that the idea which moved the court below was the thought that it was helping Congress solve the dilemma of inconsistent statutes by reading a repeal of the Sherman Act into the agricultural acts. Unless these laws actually follow inconsistent policies, there is no basis for the judicial repeal of the antitrust laws in the opinion below no matter how broadly one construes the court's power to supply phrases to conform to supposed congressional intention. We insist (1) that the District Court had no power to rewrite these statutes even if they

were inconsistent with the Sherman Act in economic policy, and (2) that there is no foundation for the theory of inconsistency between these statutes, which is the sole basis of the court's assumption of legislative power.

The agricultural legislation involved in this case aids rather than impedes the application of the Sherman Act to agricultural products by clarifying the conception of what are reasonable combinations and reasonable restraints in agricultural production and distribution. The Sherman Act itself does not prohibit reasonable restraints of trade. It has a double function (1) to prevent *unreasonable* restraints and (2) to define the activities of *reasonable* combinations. Broadly speaking, combinations or the exercise of power by combinations, are reasonable where they are necessary for the efficient operation of an industry or the efficient marketing of its goods. The Sherman Act is not intended to stop industrial progress in a machine age. This has been recognized by the courts in enforcing the antitrust laws. It has been recognized by Congress in passing legislation in aid of the antitrust laws.

One of the criteria for determining the reasonableness of any combination is whether it contributes to the orderly marketing of a product without destroying effective competition. Another criterion is whether a combination is necessary to raise a particular group of producers to a position

where they have equal bargaining power with others in the marketing of their goods and services. Without concerted action the individual farmer, like the individual laboring man, cannot bargain on anything like an equal basis with competing organizations which buy his goods. It is only by the pooling of strength that the agricultural producer can hold his own. The intention of the Capper-Volstead Act is to give legislative recognition to the reasonableness of collective bargaining by agricultural cooperatives for the mutual benefit of their members. The intention of the Agricultural Marketing Agreement Act is in part to recognize the reasonableness of certain marketing practices as an aid both to collective bargaining and the efficient distribution of agricultural products with appropriate supervision by a responsible public official. That aid goes so far as to put a floor under milk prices, under certain conditions, none of which were in effect when this indictment was filed or when the acts charged in the indictment were committed. The purpose of this aid is to secure parity prices to farmers, without destroying competition or preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.

It may be that some of the concerted action approved by Congress in this legislation would have been approved by the courts in the absence of legislation. In any event, it is not inconsistent with an economic interpretation of the rule of reason which Congress is entitled to make.

In *Appalachian Coals Inc,* v. *United States,* 288 U. S. 344, the Court approved a marketing combination similar in purpose at least to the combinations made legal by the agricultural legislation under discussion. In that case the Court approved of a protective combination of producers for the purpose of obtaining a better competitive position in the chaotic coal industry. Similar economic conditions led to the Congressional recognition that the combined actions of the farmers outlined in these agricultural acts were reasonable.

It is certainly not true that in passing the recent legislation Congress forgot about the Sherman Act and therefore inadvertently omitted a clause exempting agricultural products from its operation. Indeed, it is abundantly clear that the application of the Sherman Act was one of the important issues debated by Congress; that there was no intention of repealing the Act, and that the only intention was to supply the courts with a guide as to what Congress intended to be included within reasonable combinations. The congressional action was taken for the express purpose of ending the uncertainty

of litigation which was an obstacle to the development of farm organizations and the reasonable exercise of their power.

Wherever a combination or concerted action is recognized by the legislature to be legal, the function of the Sherman Antitrust Law is to prevent the unreasonable use of a limited privilege to restrain trade in a way which was not intended in the granting of that privilege. There are no legal privileges which are not subject to this limitation. Even patents and copyrights, though in form absolute monopolies, may be used in violation of the antitrust laws. What is a reasonable use of the patent or copyright depends upon the courts' interpretation of the scope of those privileges. In the recent case of *Interstate Circuit* v. *United States*, 306 U. S. 208, where an unreasonable use of the copyright privilege was charged, members of this Court differed as to the scope of the copyright laws. Neither the majority nor the dissent, however, even suggested that the exercise of the copyright privilege was not limited in at least some respects by the Sherman Act.

The corporate franchise is another privilege of combination, the reasonable use of which is under the constant supervision of the antitrust laws. The agricultural legislation here discussed was passed for the express purpose of giving farmers the opportunity to combine so that they might be in a competitive position in relation to great corporate

organizations. There is no basis whatever for saying that the use of the *corporate privilege* is subject to the antitrust laws, and the use of *marketing organizations* for farm cooperatives is wholly exempt.

The opinion of the court below holds in effect that Congress, by passing this agricultural legislation, intended to exempt those handling agricultural products from prosecution for every form of unreasonable restraint or unreasonable use of the privileges of combination granted to them. Under this interpretation, a small and aggressive group of farmers could use their organization in combination with the distributors in such a way as to prevent all the rest of the farmers from having any access to the market. Under this interpretation, even if sufficient votes in favor of a marketing order were not obtained, never the less every restraint of trade would be permitted in agricultural products. On the other hand, if a marketing order were put into operation, any use of that order, or of the procedure to obtain the order, which an ingenious buccaneer could devise to obtain a monopoly position, would go unpunished. These results are reached by reading into the agricultural legislation a repeal clause which cannot be found in the printed act which Congress passed.

The fact is that the failure expressly to repeal the Sherman Act is not an inadvertent omission. Congress has guarded the principles of the antitrust laws because their repeal without substitut-

ing positive and direct administrative regulation in any industrial area means either the establishment of monopoly or the development of a system of cartels with the power to crush all enterprise which opposes them. The recognition of reasonable combinations for limited purposes not inconsistent with a competitive economy is, of course, essential to the administration of the Act, not inconsistent with it. The addition of positive administrative regulation is often required. Yet the antitrust laws still remain, even in such a case, (1) to fill in the gaps where positive administrative regulation does not extend, and (2) to prevent the unreasonable distortion of legislative privileges into restraints of commerce for which they were not designed.

The principle involved here extends far beyond the present case. In an age of increasing organization there is an increasing need to curb the unreasonable use of the peculiar privileges which may be granted to those organizations. Congress has in the past, and will in the future, recognize the necessity of allowing weaker organizations to protect themselves, not in the interest of promoting monopolies or cartels, but in the interest of making it possible for competing groups to survive against their stronger opponents. The so-called fair trade acts, the resale price maintenance acts, the collective bargaining acts for labor, are examples. The principle of legislative interpretation applied by

the court below would permit a privilege of maintaining a retail price of an advertised product to be used as a practical monopoly by a concern which dominated the entire retail field. It would permit the fair trade acts to be used as means of extortion by relieving from penalty a collusive use of that kind of privilege.

Finally, the repeal of the Sherman Act by implication in cases such as this would permit positive regulatory provisions to function without any judicial background of precedents in favor of competition and against unnecessary restraints of trade. Every regulatory statute would have to be complete in itself. Even the Interstate Commerce Act does not cover all the activities of railroads. It, and all other acts like it, were passed against a background of judicial decisions favoring competition which made it unnecessary to cover every possible ramification of the industry. Regulatory acts could no longer proceed step by step leaving unchanged such portions of the law as Congress did not intend to change or portions which escaped its attention.

The traditional policy of Congress expressed in the long line of decisions interpreting the Sherman Act has always been taken as a starting point whenever Congress desired to adapt those principles to the peculiar conditions of a particular industry. The entire opinion of the court below is based on the single idea that Congress desired to abandon

that traditional policy. This error is fundamental and completely vitiates the premise from which the reasoning of the lower court proceeds. The existence of the error which is demonstrable on the surface of the statutes here involved becomes incontrovertible when we examine the statutory provisions in detail.

1. None of the statutes enacted since the Sherman Act and before the Marketing Agreement Act exempts agricultural products from the operation of the Sherman Act

The Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17,[11] provided that agricultural organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit were not to be considered, in and of themselves, illegal combinations or conspiracies in restraint of trade under the antitrust laws. The approval of such combinations does not extend to the acts alleged in Counts One, Two, and Four of the indictment in this case,

[11] The court below considered the application of Section 6 of the Clayton Act (Act of October 15, 1914, U. S. C., Title 15, Section 17), Appendix B, page 70, and the Capper-Volstead Act (Act of February 15, 1922, U. S. C., Title 7, Sections 291, 292), Appendix B, page 70, only in reference to the demurrers of the Pure Milk Association, an incorporated cooperative association of milk producers, and certain of its officers and agents. The effect of these statutes in their specific relation to those defendants is discussed separately hereafter, *infra* pages 57–68. To avoid repetition of this exception in this part of the argument we shall refer to these statutes in Part II only in relation to their application to the other defendants, none of whom are cooperative associations.

and the court does not rely upon it to sustain its decision as to these counts.

The Capper-Volstead Act of February 18, 1922 (U. S. C., Title 7, Sections 291, 292)[12], broadens the authorization of the Clayton Act so as to approve of collective action by farmers through corporations having capital stock and operated for profit in preparing their products for market and selling them. The Act in Section 2 adds a provision against profiteering by farm cooperatives which gives the power to the Secretary to act against unduly increased prices of any agricultural products. This provision goes beyond the powers granted in the Sherman Act by permitting a direct attack upon unduly enhanced prices regardless of the legality of the combination. We will discuss the effect of this provision in the part of the brief which deals with the indictment of the cooperative. The court below did not suggest that it had any relevance to the application of the Sherman Act to the acts charged in Counts One, Two, and Four of the indictment.

The court refers to the Cooperative Marketing Act of July 2, 1926, c. 725, 44 Stat. 803, U. S. C., Title 7, Section 455,[13] merely to indicate the establishment of a closer contact between the government and farmers' cooperatives, not as indicating the establishment of any general exemption from the antitrust laws.

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[12] Appendix B, *infra*, page 71.

[13] See R. 106.

Obviously, none of these acts exempts interstate commerce in milk from the application of the Sherman Act, nor does the court below so hold. We believe that far from supporting the decision, the earlier statutes just discussed illustrate the consistent care which Congress has exercised in giving its approval to particular combinations to limit that approval to the particular requirements of the policy immediately sought.

2. The qualified exemptions from the antitrust laws expressly provided for by the Marketing Agreement Act do not exempt commerce in agricultural products generally from the operation of the Sherman Act.

The court below based its decision exempting agricultural products from the Sherman Act solely on implication from the scheme of regulation established by the Marketing Agreement Act. It reached this conclusion in the face of the fact that the Marketing Agreement Act not only contained no such general exemption but did contain a qualified exemption, necessary to make valid the plan of regulation, which plainly indicates that Congress did not even consider granting a general exemption. If Congress had intended by the Marketing Agreement Act to exempt commerce in agricultural products from the operation of the Sherman Act it would have done so by clear and explicit language.[14] The Act contains no such language. Instead, it provides two narrowly defined and ex-

[14] See Clayton Act (U. S. C., Title 15, Section 12, *et seq.*); Miller-Tydings Act (U. S. C., Title 15, Section 1); Federal

plicitly limited exemptions applicable only to the marketing agreements and arbitration procedures provided for in the Act itself.

Section 8 (b)[15] provides that marketing agreements to which the Secretary is required to be a party, which may be entered into only after notice and public hearing and which are strictly limited to the accomplishment of the express purposes of the Act, shall be exempt from the antitrust laws.

Whatever the scope of this exemption may be, it can not apply in the instant case. The acts charged in the indictment were committed at a time when there was no marketing agreement or order in effect in the Chicago market. Thus, apart from all other considerations, the very terms of the exemption prevent its application to the situation now under discussion.

Trade Commission Act (U. S. C., Title 15, Section 41, *et seq.*); Shipping Act, 1916, Section 15 (U. S. C., Title 46, Section 814); Packers & Stockyards Act, Section 405 (U. S. C., Title 7); Emergency Railroad Transportation Act of 1933, Section 10 (U. S. C., Title 49); Motor Carriers Act, 1935, Section 213 (U. S. C., Title 15).

[15] Section 8 (b) provides in part:

> In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects inter-

Furthermore, the effect of the exemption is to establish that the statute did not create any general immunity from the application of the antitrust laws. It is well established that the creation of a specific exemption in a statute negatives any implication that other and broader exemptions were intended by the legislation. An exception in a statute "amounts to an affirmation of the application of its provisions to all other cases not excepted." *Bend* v. *Hoyt,* 13 Pet. 261, 271–272; *Equitable Life Association* v. *Clements,* 140 U. S. 223. The clear effect of Section 8 (b) is to establish that no general exemption was intended or made. If this were not plain from the language itself, the legislative history of the section removes all doubt that Congress did not intend the result reached by the court below.

When the bill was introduced in the House, *the marketing agreement exemption provision did not appear in it.*[16] Despite this omission the Committee on Agriculture, in the report which accompanied the bill, stated that "any such agreement

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state or foreign commerce in such commodity or product thereof. *The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States,* and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this Act. * * * [Italics supplied.]

[16] H. R. 3835, 73d Cong., 1st sess., 77 Cong. Rec., Part I, page 646.

to which the Secretary has become a party would be a valid agreement under law, and to the *extent of the terms thereof* exempt from the restrictions of the antitrust laws."[17] [Italics supplied.] It is therefore apparent that the Committee which considered the bill and submitted it to the House was of the opinion that in the absence of any express exemption the authorization of the marketing agreements would establish an exemption in favor of those who entered into agreements with the Secretary but only "to the extent of the terms thereof."[18]

An examination of the legislative history of the Act and particularly of the exemption provision leads to these conclusions: (1) the exemption provision was added not because Congress believed that it was absolutely necessary, but out of an abundance of caution and so that no question might arise as to the legality under the antitrust laws of the mere making of a marketing agreement pursuant to the terms of the Act;[19] (2) that great care was taken in framing the exemption provision to make sure

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[17] H. R. Rep. 6, 73d Cong., 1st sess., page 4.

[18] This view is in accord with the rule that governmental approval would render such an agreement lawful. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 448; *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37.

[19] See particularly, 77 Cong. Rec. Part II, page 1970; 77 Cong. Rec. Part. II, page 1968.

that no general immunity from the antitrust laws was conferred.[20]

The purpose of Congress not to confer general immunity from the application of the antitrust laws is shown by the following colloquies which took place when the exemption provision was under consideration by the Senate:

> Mr. HEBERT. If the Senator's amendment shall be adopted, of course, it will abrogate the provisions of the antitrust law to the extent of its application to those commodities enumerated in the bill.
>
> Mr. NORRIS. No; not necessarily. I would not put it that broadly. I would say to the extent of the agreement.
>
> Mr. HEBERT. To the extent of the agreement as it applies to the commodities covered in the bill.
>
> Mr. NORRIS. Yes.[21]
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> * * * * *
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> Mr. BORAH. Mr. President, may I ask the Senator from South Carolina if there is any provision in the bill repealing the antitrust acts?

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[20] See particularly, 77 Cong. Rec. Part II, page 1971; 77 Cong. Rec. Part II, page 1970; 77 Cong. Rec. Part II, page 1977; 77 Cong. Rec. Part II, page 1982; 77 Cong. Rec. Part III, page 3022; H. R. Rep. 100, 73d Cong., 1st sess., page 2; 77 Cong. Rec. Part III, page 3024, H. R. Rep. 100, 73d Cong., 1st sess., page 8; 77 Cong. Rec. Part III, page 3066; 77 Cong. Rec. Part III, page 3114; 77 Cong. Rec. Part III, page 3117.

[21] 77 Cong. Rec., Part II, page 1977. Senator Norris introduced the amendment which contained the immunity provision. 77 Cong. Rec. Part II, page 1970.

Mr. SMITH. Oh, no; it does not repeal the antitrust acts. It only provides that where agreements shall be entered into touching any commodities, the antitrust acts will be suspended during the time of the life of such agreements, under such restrictions as the Secretary may make in the agreements themselves.[22]

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Mr. BANKHEAD. The clause referred to is designed to provide that only agreements made with the Government shall be exempt from the effects of the antitrust law. It does not permit any agreement among the processors themselves.

Mr. SMITH. Oh, no.[23]

Like the exemption from marketing agreements provided in Section 8 (b) of the Marketing Agreement Act, the exemption provided in Section 3 (a)[24] of that Act is limited to action provided for by the Act itself. It applies only to meetings held and awards and agreements made in the course of

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[22] 77 Cong. Rec., Pt. III, page 3117. Senator Smith was Chairman of the Senate Committee on Agriculture, which reported the bill, and a member of the Conference Committee.

[23] 77 Cong. Rec., Pt. III, page 3117. Senator Bankhead was a member of the Senate Committee on Agriculture.

[24] Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market

arbitration proceedings conducted under Section 3 (a) itself. That section provides safeguards for the interests of all parties concerned. Such proceedings differ widely from unrestrained private agreements and the defendants do not suggest that any of the acts charged in the indictment were carried out under the provisions of Section 3 (a) or that they fall within its exemption. Far from sug-

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or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

gesting a general exemption from the Sherman Act the provisions of Section 3 (a) add to the internal evidence in the statute itself that no general exemption was intended.

3. The declared policy of the Marketing Agreement Act discloses no intention to exempt agricultural products from the operation of the Sherman Act

The Marketing Agreement Act in Section 1 sets out in the following terms the particular situation with which it seeks to deal:

> It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest and burden and obstruct the normal channels of interstate commerce.

The conditions in interstate commerce sought to be met are thus clearly stated to be limited to those which affect, or are affected by, the relative purchasing power of farmers.

In Section 2,[25] Congress states its purpose to establish and maintain for agricultural commodities in interstate commerce such orderly marketing conditions as will establish prices to farmers at a level that will give such commodities a purchasing power

[25] Appendix A.

with respect to articles farmers buy equivalent to the purchasing power of such commodities in a defined base period. Broad as it may be, this purpose does not embrace all aspects of interstate commerce in agricultural commodities. Many factors may affect interstate commerce in such commodities without depressing prices to farmers.

Congress limits this primary purpose by stating also its purpose to protect the interests of consumers by approaching the desired level of prices only gradually and by expressly stating that it authorizes no action designed to maintain prices to farmers above the specified level.[26] There is no expression in this clause of any intent to limit any activities except those provided for in the Act itself as means of carrying out its purpose to enhance farm prices.

Taken together these purposes clearly limit the regulation authorized to action designed to increase the purchasing power of farmers by maintaining adequate prices for their products. The Act purports to do nothing more than that. This falls far short of a purpose to prevent all evils affecting interstate commerce in agricultural commodities which might result from the combinations and conspiracies made illegal by the Sherman Act.

For example, prices to farmers might be enhanced by a program under the Marketing Agree-

[26] Appendix A.

ment Act without substantially increasing prices to consumers. But even with such a program in effect, private combinations, without materially affecting prices paid to farmers, might contrive so to increase the prices required of consumers as to impede seriously the flow of agricultural products in interstate commerce. Similarly, private combinations, without depressing farm prices, might exclude competitors from the field of distribution, or hold off the market quantities of needed agricultural commodities. The Act's statement of policy lacks any expression of intention to regulate commercial restraints or controls carried out by private groups, even where one of its programs is in effect, unless the result of such private activities is to depress farm prices. Even more clearly, its purpose does not include regulation of restraints upon commerce by private combinations where, as in this case, there had been no finding that farm prices would be enhanced by regulation under the Act and where, accordingly, no program was in effect.

The stated purposes of the Act, thus limited as they are, make it evident that they do not replace the Sherman Act or become the sole provision for regulation of interstate commerce in agricultural commodities. Moreover, the powers granted to the Secretary under the Act are carefully limited to action designed to accomplish these stated purposes. As we shall point out they do not expand

the Act's purposes nor give any power to deal with restraints of commerce in agricultural products except those which impede enhancement of farm prices to the parity level.

4. The methods provided by the Marketing Agreement Act for regulation of interstate commerce in agricultural products disclose no intention to exempt such products from the operation of the Sherman Act

The Act provides for the regulation of agricultural marketing by two methods—marketing agreements, to which the Secretary must be a party, and orders to be issued by the Secretary.[27]

A marketing agreement may be executed only after notice and a public hearing. No power is given to the Secretary to initiate a marketing agreement nor can he force members of the industry to enter such an agreement. It is purely voluntary and affects only the signers, but the Secretary must be a party to it. If executed independently of an order, it may include any terms or conditions found to effectuate the declared policy of the Act. It may fix prices and marketing practices. Obviously, such an agreement might violate the Sherman Act were

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[27] At the last term in *United States* v. *Rock Royal Co-operative, Inc.*, decided June 5, 1939, this Court considered the details of the method by which the distribution of milk is regulated through orders under the Marketing Agreement Act. The scheme of regulation was described in the brief of the United States in that case on pages 10–34. Accordingly it will only be summarized here.

it not for the provision in Section 8 (b)[28] that the making of such an agreement shall not be held to be a violation of the antitrust laws.

Orders may be issued with or without the execution of a marketing agreement [29] and, like marketing agreements, may be issued only after notice and opportunity for a hearing.[30] The Secretary is required to issue an order if, on the evidence introduced at the hearing, he finds (in addition to other findings which he is required to make) that the issuance of the order will tend to effectuate the declared policy of the Act.[31] The terms and conditions which may be included in orders regulating the handling of milk are specified in the Act.[30]

Orders may be issued in connection with a marketing agreement only if handlers who handle not less than fifty per cent of the volume of the commodity in the area covered by the order have signed the marketing agreement and only if the Secretary determines that the issuance of the order is approved or favored by at least two-thirds of the producers producing the commodity for sale in the marketing area during a representative period, or by the producers of two-thirds of the volume of the

[28] Appendix A, and see *supra* pages 37–42.
[29] Sections 8 (c) (8), 8 (c) (9), Appendix A.
[30] Sections 8 (c) (3), 8 (c) (4), Appendix A.
[31] Section 8 (c) (4), Appendix A.

commodity sold during the representative period within the marketing area.[32]

Orders are to be issued notwithstanding the failure of handlers to enter into a marketing agreement, if the Secretary, with the approval of the President, determines (a) that the failure of the handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act, and (b) that the issuance of the order is the only practicable means of advancing the interest of the producers of the commodity pursuant to the declared policy, and is approved or favored by at least two-thirds of the producers who have been engaged in the production of the commodity covered by the order, or by producers who have produced for market at least two-thirds of the volume of the commodity covered by the order.[33] No order may be issued unless it regulates the handling of the commodity in the same manner as a marketing agreement upon which previously a hearing has been held.[34]

The Act provides for administrative review of the provisions of orders on petition by handlers and for modification of the order or the granting of exemption if the provisions complained of are found not to be in accordance with law. The Sec-

[32] Sections 8 (c) (5), 8 (c) (7), Appendix A.
[33] Section 8 (c) (9), Appendix A.
[34] Section 8 (c) (10), Appendix A.

retary's ruling on such a petition is subject to review in the district courts of the United States."[35]

The Secretary is required to terminate an order or suspend its operation whenever he finds that it obstructs or does not tend to effectuate the declared policy of the Act,[36] or when he finds that its termination is favored by a majority of the producers affected by the program, who must represent more than fifty percent of the producers of the commodity covered by the marketing agreement or order."[37]

The court below proceeded upon the assumption that the provisions of the Marketing Agreement Act with respect to marketing agreements and orders vested complete jurisdiction and control over the marketing of agricultural commodities in the Secretary of Agriculture, without regard to the desires of producers and handlers.

It is evident from this summary of the powers conferred upon the Secretary that they are not self-executing. The marketing agreements are wholly voluntary. The orders can become effective only upon approval by a specified percentage of producers of the commodity subject to the order and, in the case of orders issued in connection with marketing agreements, upon approval by a specified percentage of handlers of the commodity. More-

[35] Section 8 (c) (15), Appendix A.
[36] Section 8 (c) (16) (A), Appendix A.
[37] Section 8 (c) (16) (B), Appendix A.

over, the regulation must be terminated if a specified percentage of producers favors its termination. We submit that no scheme of regulation, the object of which is so clearly limited to the enhancement of farm prices of agricultural products that the regulation is made subject to approval by the producers for whose benefit it is enacted and of the handlers whose activities it regulates, can properly be treated as vesting in the Secretary the "full, complete, and plenary power" of Congress over interstate commerce in agricultural commodities. If the grant of power to the Secretary falls short of this, it cannot sustain the decision below.

The limited scope of the Marketing Agreement Act is evident also from the fact that the powers granted to the Secretary cannot be exercised to regulate all phases of interstate commerce in agricultural products for all purposes. The authority to exercise the powers is expressly limited to situations in which it is found that their exercise will tend to effectuate the stated purpose to enhance farm prices of such products.

Marketing agreements are authorized only "in order to effectuate the declared policy."[38] The Secretary may give notice and an opportunity for hearing upon a proposed order only when he has reason to believe that the issuance of an order will tend to effectuate the declared policy.[39] He may

[38] Section 8 (b), Appendix A.
[39] Section 8 (c) (3), Appendix A.

issue the order only if he finds that its issuance will tend to effectuate the declared policy.[40] He is required to terminate any order whenever he finds that it obstructs or does not tend to effectuate the declared policy.[41] The regions to which orders are to apply are to be determined wholly on the basis of the effectuation of the declared policy.[42] The Act specifies the provisions which may be included in orders.[43] All such provisions are obviously related only to the accomplishment of the declared policy. No other provisions may be included. In the case of milk, orders may require the payment of minimum prices to producers but there is no authority to include provisions for maximum prices to producers or provisions regulating in any way the prices at which milk is sold to consumers. The Secretary is left without power to regulate these factors both of which may directly affect interstate commerce in milk.

However broad the power vested in the Secretary might be in the absence of the limits imposed by the constant references to the declared policy, it cannot be construed, in view of such references, as an unrestrained power to regulate the production and marketing of agricultural commodities for all purposes.

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[40] Section 8 (c) (4), Appendix A.
[41] Section 8 (c) (16), Appendix A.
[42] Section 8 (c) (11) (A), Appendix A.
[43] Sections 8 (c) (5) and 8 (c) (7), Appendix A.

It is significant also that the Secretary's power to issue orders and marketing agreements is limited by the denial of power to take any action, the purpose of which would be to raise prices paid to farmers above the level specified in the Act. The Secretary has no power whatever under the Marketing Agreement Act with respect to any commodity the price of which exceeds that level. Under the decision of the court below, there would be no restraint whatever upon impediments to interstate commerce in that commodity. Obviously, Congress did not intend that result. Moreover, no statute which leaves such a clear gap in the regulation imposed can be held so completely to usurp the field of regulation as to repeal, by implication, a previous statute which provided for regulation applicable in such a case.

We submit that the device of marketing agreements and orders provided for in the Marketing Agreement Act is not a complete scheme for regulation of interstate commerce in agricultural products, but a regulation clearly adapted and definitely confined to but one purpose, the gradual establishment of parity prices to farmers. The granting to the Secretary of such authority as is necessary for that purpose has no effect upon the application of the Sherman Act to private restraints of commerce in agricultural products which are unrelated to that purpose. Plainly the Marketing Agreement Act does not exert the whole

power of Congress to regulate commerce in agricultural products.

We are not left by this Act to draw general conclusions based upon implications as to the philosophy behind the legislation. The purposes of the Act, the scheme of regulation which it embodies, and the narrow exemptions from the operation of the Sherman Act which it provides all make it clear that Congress intended the antitrust laws to remain fully effective except to the extent that specific exemption was provided in the terms of the Marketing Agreement Act itself.

The comments of the Secretary of Agriculture in an address before the American Institute of Cooperation of the University of Chicago, August 7, 1939,[44] concisely summarize the view which we believe the statute itself expresses. They are quoted here in part as a pertinent commentary by the administrator of the Marketing Agreement Act upon the policy which that Act expresses.

> The other thing I want to make clear is that, in spite of anything you may have read, the policies of the Department of Agriculture and the Department of Justice in trying to cope with the Chicago milk situation are in harmony with each other. Both are designed to protect the public interest.
>
> The kind of practice which should not be

[44] Official Press Release of U. S. Department of Agriculture, No. 238-40.

tolerated is that which results when groups lock themselves up in some back room and, with no representative of the public sitting in, make deals which ignore the public interest. What is perhaps not generally understood is that there is a sharp distinction between this kind of practice and the procedure involved in marketing agreement programs. Marketing agreement procedure includes a public hearing in which the issues are laid out in the open. It results in a program which is administered by Federal authority and which *must* recognize the interests of all groups.

The prosecutions which have been carried on by the Department of Justice were occasioned by acts alleged to have been committed in the past, and in the absence of the type of market stabilization which the marketing agreement programs provide. Even if a marketing agreement is placed in effect in the Chicago market, it can deal with only a part of the problem. The Marketing Agreement Act does give the Department of Agriculture authority to regulate milk prices paid by distributors to producers. But the Department of Agriculture has no authority whatever to regulate resale prices. Consequently, if monopolistic practices exist in the milk distribution industry, the only agency of government having any authority to act is the Department of Justice.

III

THE CAPPER-VOLSTEAD ACT DOES NOT EXEMPT AGRICULTURAL COOPERATIVE ASSOCIATIONS FROM THE SHERMAN ACT

The judgment of the District Court (R. 114–118, par. 2) sustained the demurrers of the Pure Milk Association, its officers and agents, as to all counts of the indictment on the ground that agricultural marketing associations are exempt from prosecution under Section 1 of the Sherman Act (R. 115). The order and judgment of the District Court formally recites that this exemption of agricultural marketing associations derives from Section 6 of the Clayton Act, the Capper-Volstead Act, and the Agricultural Marketing Agreement Act. From the court's opinion, however, it is apparent that in reaching this conclusion reliance was placed primarily, if not exclusively, upon the provisions of the Capper-Volstead Act. For this reason we will discuss the Capper-Volstead Act separately in connection with the indictment of the Pure Milk Association.

The Pure Milk Association is an agricultural cooperative association possessing whatever privileges and exemptions the Capper-Volstead Act is intended to give. That act removed the restriction of Section 6 of the Clayton Act with respect to capital stock and profits of farm cooperatives and

allowed farmers to combine for mutual benefit in the same way that individual stockholders are permitted to act together in a modern, private, commercial corporation. So far as this privilege is concerned there is nothing to indicate any general exemption from the antitrust laws.

The view that Section 1 of the Capper-Volstead Act was enacted for the purpose of removing the restrictions with respect to capital stock and profit imposed by Section 6 of the Clayton Act is supported by the language of Mr. Justice Brandeis in his dissenting opinion in *Frost* v. *Corporation Commission,* 278 U. S. 515, 541–542:

> * * * The enactment of state laws for the incorporation of nonstock co-operatives and their extensive use in the co-operative marketing of commodities, are due largely to the fact that, prior to 1922, the Clayton Act, October 15, 1914, c. 323, § 6 (38 Stat. 731), limited to nonstock co-operatives the right to make a class of agreements with members which prior thereto would have been void as in restraint of trade. * * * Nearly one-half of the existing laws of the nonstock type were enacted between 1914 and 1922. This limitation in the Clayton Act proved to be unwise. By the Capper-Volstead Act of February 18, 1922, c. 57, § 1 (42 Stat. 388), Congress, recognizing the substantial identity of the two classes of co-operatives, extended the same right to stock co-operatives. * * *

The right of collective bargaining on the part of farmers is protected and nothing in the Act even remotely suggests that the abuse of that privilege should be removed from the supervision of the Sherman Act.

The court itself admits that the Clayton Act did not exempt the activities of agricultural cooperatives from the scope of the antitrust laws (R. 105–106). Nevertheless, the court thought that the Capper-Volstead Act which broadened the legitimate activity of farm cooperatives went so far as to repeal the Sherman Act.

This conclusion appears to be based upon Section 2 of the Capper-Volstead Act which authorizes the Secretary to order a farm association which he finds "monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof" to cease and desist. The power to enter such an order in the opinion of the court took away from the Federal courts the right to prevent any unreasonable use of the privileges given to the farm cooperatives.

This conclusion the court reached through the process of viewing a "legislative trend" and not by virtue of any language whatever in the Act itself. Assuming *arguendo* a judicial power to rewrite statutes to make them conform to legislative trends, we will show that no such trend can be spelled out of the Capper-Volstead Act.

The power given to the Secretary to protect the public against unduly enhanced prices resulting from farm cooperatives is similar to an anti-profiteering law. It opens up a field going far beyond the purview of the Sherman Act, to wit, direct government intervention in price policy in cases where no other evidence of illegal combination exists. The Sherman Act itself has nothing directly to do with the reasonableness of prices. If a combination is not unreasonable in using its privileges to restrain trade, it is immaterial how high the prices go. On the other hand, a combination or conspiracy to fix prices cannot be justified on the ground that the prices are not unreasonably high. Labor, for example, has the right of collective bargaining. This right, however, is not a blanket exemption. *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex Co.* v. *Deering,* 254 U. S. 443; *Bedford Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37, 49–50. However, assuming that a labor combination acts within its legitimate objectives, the Sherman Act does not inquire whether or not the wages obtained by collective bargaining are unduly enhanced.

Yet the court below reads into the grant to the Secretary of Agriculture of power to prevent collective bargaining from going too far, a license to restrain trade in any way and for any objective. Thus a positive limitation on the activity of farm cooperatives is construed into a blanket permission to violate the antitrust laws. We confess that we

are unable to see how this result can be reached by any logical process. It is like saying that the passage of an antiprofiteering law prohibiting corporations from charging unreasonable prices licenses them to form cartels. According to this reasoning the Lever Anti-Profiteering Act must have repealed the Sherman Act.

At the risk of laboring this point, let us examine the criteria which the Secretary is supposed to apply to determine what is an "unduly enhanced" price. Those standards are not set out in the Act, but a review of the economic ideas behind farm legislation since 1920 would seem to indicate that an unduly enhanced price for a farmer is related to the idea that farmers are entitled to parity prices and parity incomes. The framers of legislation for farmers have always thought in terms of the relation of farm income to income in other fields. For years agricultural statistics have been collected to show an unbalance of farm prices. Therefore, it was natural that use of the privilege of collective bargaining it should be restricted to the objective of obtaining parity income for farmers. At least there is no other standard which we can possibly suggest to guide the Secretary in determining unduly enhanced prices of farm products. This is not the ordinary idea of unreasonable profits. It concerns the relationship of farm prices to industrial prices. While such a standard

might be difficult to apply—indeed, there are no instances yet where it has been either defined or applied under the Capper-Volstead Act—at least the intention is along the lines of moderation and limitation, and the exercise of the farmers' right to buy competitively. The court below construes this limitation as a privilege on the part of a small group of farmers to combine with a small group of distributors in such a way as to prevent all the other farmers from gaining access to the market, provided nation-wide parity prices of milk are not disturbed.

Some doubt was expressed during the debates in Congress as to the constitutionality of determining "unduly enhanced prices."[45] We do not suggest that this provision of the statute is unconstitutional, but only emphasize that this expressed doubt makes it even clearer that Congress did not intend to substitute this newly granted and very doubtful power for the existing and recognized machinery of the Sherman Act.

The indictment below does not rest the charge against the Pure Milk Association upon its own conduct alone in the normal pursuit of its business, nor upon the combined action of its farmer-members "among themselves." The Pure Milk Association and its officers and agents were *not* indicted for combining among themselves to monopolize and restrain interstate trade and commerce by unduly

[45] See for example 62 Cong. Rec., pages 2168–2170, 2221.

enhancing prices. They were indicted for combining and conspiring *in conjunction with others not mentioned in the Capper-Volstead Act* to restrain interstate trade and commerce in fluid milk by fixing, maintaining, and controlling the prices to be paid its producers (Count One); by fixing and maintaining prices at which fluid milk is sold in Chicago (Count Two); by determining and controlling the distribution of fluid milk in Chicago (Count Three); and by controlling the supply of fluid milk permitted to be brought into the City of Chicago (Count Four). The illegality, therefore, consists in combining and conspiring with others outside of its organization and in restraining trade by means other than by unduly enhancing prices.

It is submitted that the powers conferred upon the Secretary of Agriculture under Section 2 of the Capper-Volstead Act do not in any respect limit or confine the criminal jurisdiction of the District Court to prosecute violations of the Sherman Act.[46] There is no necessary repugnance between the existence of the special administrative powers of civil enforcement conferred upon the Secretary

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[46] These conclusions are supported by Nourse, *The Legal Status of Agricultural Co-operation* (1927) at page 260:

> Some co-operatives have apparently supposed that the passage of the Capper-Volstead Act removed them from the initial jurisdiction of the Department of Justice or from any regulatory action on the part of the Federal Trade Commission. Such a view, however, is not justified. The Department of Jus-

of Agriculture and criminal jurisdiction. It is now well settled that one who becomes a party to a combination and conspiracy in restraint of trade and commerce may be subject to prosecution under the Sherman Act at the instance of the Government without regard to the peculiar power of control and regulation which is vested in some administrative agency by another statute. Although the Interstate Commerce Act embodies a remedial system that is complete and self-contained, the Sherman Act has been held to apply to companies subject to the jurisdiction of the Interstate Commerce Commission, on the theory that the Sherman Act and the Interstate Commerce Act are wholly independent of each other. *United States v. Pacific and Arctic Ry. Co.*, 228 U. S. 87; *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

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tice is still entrusted with the enforcement of the Sherman and Clayton Acts, and the Federal Trade Commission retains the special powers conferred upon it by the Federal Trade Commission Act applying to business enterprises under the co-operative form as well as partnerships and ordinary corporations. *In addition, special powers of original jurisdiction have now been conferred upon the Department of Agriculture as a third regulatory agency*, but without removing co-operative associations from the authority of the Department of Justice and the Federal Trade Commission * * *. [Italics supplied.]

The legislative history of the Capper-Volstead Act shows that Congress did not intend to exclude farm organizations from the scope of the antitrust laws when they used their privilege of collective bargaining to attain an end not in accord with the purpose for which the privilege was granted. The Act was enacted substantially in the form introduced in the House of Representatives by Mr. Volstead as H. R. 2373.[47] On April 26, 1921, this bill was reported to the House of Representatives from the Committee on the Judiciary by Mr. Volstead, with recommendation that it pass with a minor amendment not pertinent to this discussion. House Report No. 24, pages 1–3, 67th Cong., 1st sess., 61 Cong. Rec., Part I, page 687. This Report stated in part as follows:

> The object of this bill is to authorize the producers of agricultural products to form associations for the purpose of collectively preparing for market and marketing their products.
>
> * * * * *
>
> In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corpora-

[47] 67th Cong., 1st sess., 61 Cong. Rec., Part I, page 98.

tions now enjoy so that they may be able to do business successfully in competition with them.

When the bill was first called up in the House of Representatives by Mr. Volstead, he stated further in explanation of its objectives:[46]

> It aims to authorize cooperative associations among farmers for the purpose of marketing their products. * * *
>
> The objection made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity. When he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. *Businessmen can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.* It is objected in some quarters that this repeals the Sherman Antitrust Act as to farmers. That is not true any more than it is true that a combination of two or three corporations violates the act. Such combi-

[46] 61 Cong. Rec., Part I, page 1033.

nations may or may not monopolize or restrain trade. Corporations today have all sorts of subsidiary companies that operate together, and no one claims they violate this act.

* * * * *

Mr. SABATH. In what way does this bill differ from the Clayton Act? The Clayton Act in a sense permits the farmers to organize.

Mr. VOLSTEAD. The Clayton Act does not permit them to have any stock or operate for any profit. This bill makes it possible for them to have a small amount of stock and to operate to some extent for profit, but the profit must not exceed 8 percent on their capital. [Italics supplied.]

The Senate Committee to which the bill was referred reported through Mr. Walsh a substitute bill which eliminated Section 2 in its present form, and substituted a provision to the effect that Section 1 should not be deemed "to authorized the creation of or attempt to create a monopoly," or to exempt any association from the provisions of the Federal Trade Commission Act on account of unfair methods of competition. Senate Report 236, 67th Cong., 1st sess. This amendment was rejected by the Senate, which instead passed the bill substantially in the form of H. R. 2373. The extensive debate in the Senate on the bill concerned itself principally with the difference between the provisions of Section 2

of the House Bill and of the Senate substitute. It is noteworthy that in the entire Senate debate, and particularly in the arguments of Mr. Walsh in favor of his substitute and in the replies of proponents of the House bill, consideration was confined to the possibility that such associations in and of themselves, by virtue of their size and the scope of their own activities, might completely dominate the market in certain products.[49] The problem, therefore, to which Section 2 of the House Bill as finally enacted and the Walsh substitute commonly addressed themselves, was the devising of some means of restraint over the possible complete control and dominance of the market which such an association might acquire in a certain product. In no respect does it appear from the debates that Section 2 of the Act, as enacted, or as in the rejected Walsh substitute, was considered with relation to violations of the Sherman Act in the nature of combinations or conspiracies entered into with third persons, causing unreasonable restraints of trade of the character that would offend the Sherman Act if participated in by any ordinary business corporation.

CONCLUSION

For the reasons stated above, this Court has jurisdiction of this appeal. The judgment of the court

[49] See 62 Cong. Rec., pages 2048–2054, 2057–2061, 2107–2123, 2156–2174, 2216–2230, 2256–2282.

below sustaining the demurrers to Counts One, Two, and Four of the indictment should be reversed.

Respectfully submitted.

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NOVEMBER 1939.

Appendix A

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937, light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. [2]

(b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish* [3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement);

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating [1] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

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[1] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1). The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning) soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[5] of milk during a representative period of time.

[5] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

MILK PRICES

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.
[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further. That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam: except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions [14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the markets for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

der such conditions and in sufficient quantities as to render or tend render ineffective or materially interfere with any program or ration undertaken, or to reduce substantially the amount of any duct processed in the United States from any commodity subject nd with respect to which any program is in operation, under this ; or the Soil Conservation and Domestic Allotment Act, as nded, he shall cause an immediate investigation to be made by the ted States Tariff Commission, which shall give precedence to stigations under this section to determine such facts. Such in- igation shall be made after due notice and opportunity for hearing nterested parties and shall be conducted subject to such regulations he President shall specify.

(b) If, on the basis of such investigation and report to him of find- s and recommendations made in connection therewith, the Presi- t finds the existence of such facts, he shall by proclamation impose limitations on the total quantities of any article or articles ich may be imported as he finds and declares shown by such estigation to be necessary to prescribe in order that the entry such article or articles will not render or tend to render ineffec- e or materially interfere with any program or operation under- en, or will not reduce substantially the amount of any product cessed in the United States from any commodity subject to and h respect to which any program is in operation, under this title or Soil Conservation and Domestic Allotment Act, as amended: vided, That no limitation shall be imposed on the total quantity any article which may be imported from any country which reduces h permissible total quantity to less than 50 per centum of the aver- e annual quantity of such article which was imported from such untry during the period from July 1, 1928, to June 30, 1933, both tes inclusive.

(c) No import restriction proclaimed by the President under this ction nor any revocation, suspension, or modification thereof shall come effective until fifteen days after the date of such proclama- on, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section all be final.

(e) After investigation, report, finding, and declaration in the anner provided in the case of a proclamation issued pursuant to ubsection (b) of this section, any proclamation or provision of such roclamation may be suspended by the President whenever he finds hat the circumstances requiring the proclamation or provision hereof no longer exists, or may be modified by the President when- ver he finds that changed circumstances require such modification carry out the purposes of this section.[15]

Sec. 2. The following provisions, reenacted in section 1 of this ct, are amended as follows:[16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

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[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 14 inclusive, supra.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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APPENDIX B

Section 6 of the Clayton Act, c. 323, 38 Stat. 730, U. S. C., Title 15, Section 17, is as follows:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

The Capper-Volstead Act, c. 57, 42 Stat. 388, U. S. C., Title 7, Sections 291, 292, is as follows:

> SEC. 1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts

and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

SEC. 2. If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be taken under such rules and regulations as the Secretary of Agriculture may prescribe, reduced to writing, and made a

part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist from monopolization or restraint of trade. On the request of such association, or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, or enter such other decree as the court may deem equitable, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending for review therein the court may issue a temporary writ of injunction forbidding such associa-

tion from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. Service of such complaint and of all notices may be made upon such association by service upon any officer or agent thereof engaged in carrying on its business, or on any attorney authorized to appear in such proceeding for such association, and such service shall be binding upon such association, the officers, and members thereof.

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, U. S. C., Title 18, Section 682, as amended, is as follows:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided,* That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, U. S. C., Title 28, Section 345, is as follows:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7.

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